



Received: 15-06-2025
Accepted: 25-07-2025

International Journal of Advanced Multidisciplinary Research and Studies

ISSN: 2583-049X

Protection of Citizens Right to Freedom of Expression on Social Media Under Act Number 1 of 2024 on Electronic Information and Transactions in Relation to the Principle of Justice

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Abstract

Freedom of expression is the right of every human being and is one of the human rights guaranteed and regulated in the Indonesian constitution. This is as stated in Article 28E paragraph (3) of the 1945 Constitution. In the digital era, social media has become the main public space for expressing opinions, but its existence is also regulated and limited by Act Number 1 of 2024 concerning Information

and Electronic Transactions (ITE Act). Until now, the protection of citizens' right to freedom of expression in Indonesia's digital space is still faced with the problem of multi-interpretable articles such as Article 27A and Article 28 paragraph (2) of the ITE Act which are often used to ensnare critics on social media, trigger criminalization, and lower the national democracy index.

Keywords: Freedom of Expression, Social Media, Justice

1. Introduction

In every country with a democratic system, human rights have a significant impact as the primary means of producing a just and powerful society. Among the various human rights, the right to express oneself is considered a fundamental right that should be maintained and protected. Today, digital technology makes it possible to express oneself more freely and immediately. The presence of social media creates a new platform for people to share their thoughts directly and widely.

Freedom of expression is a constitutional right that is available to every person. Article 28E (3) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) grants everyone the right to association, assembly, and expression.¹ The promise and protection of freedom of expression are also mentioned in the Universal Declaration of Human Rights (UDHR), which is Act Number 39 of 1999 regarding Human Rights, and Act Number 9 of 1998 regarding Freedom of expression in the public sphere. It is hoped that this regulation will create a climate that is conducive to the development of participation and creativity of every citizen as a manifestation of rights and responsibilities in a democratic life and is a consistent and continuous manifestation of law in guaranteeing freedom of expression.

Freedom of speech is a key pillar of any democratic society. Freedom of speech is the freedom for individual to express their ideas or thoughts on a matter, a manifestation of freedom of opinion and expression.² Freedom of speech can also be said to be an individual freedom, which originates from the Anglo Saxon legal system known as the principle of "habeas corpus" and this is one of the most basic guarantees of human rights.³ Democracy provides everyone with the opportunity to enjoy their freedoms proportionally, as one person freedom is limited by the freedom of others.⁴ Freedom of speech is an integral part of

¹ Ersu Kusuma, *et.al*, "Kebebasan Berpendapat Dan Kaitannya Dengan Hak Asasi Manusia (HAM), *Sanskara Hukum Dan HAM*", Vol 1, No 3, 2023, hlm 98.

² Sinta Amelia Febrianasari dan Waluyo, "Kebebasan Berpendapat Dalam Perspektif Kedaulatan Rakyat", *Jurnal Demokrasi Dan Ketahanan Nasional*, Vol 1, Tahun 2022, hlm 242.

³ Susilo, E, Din, M, Suhaimi, S., & Mansur, T. M. (2024). Justice Delayed, Justice Denied: A Critical Examination of Repeated Suspect Status in Indonesia. *Hasanuddin Law Review*, 10(3), 342–357. <https://doi.org/10.20956/halrev.v10i3.6088>.

⁴ Latipah Nasution, "Hak Kebebasan Berpendapat dan Berekspresi Dalam Ruang Publik di Era Digital", *Adalah: Buletin Hukum dan Keadilan*, Vol. 4, No. 3, 2020, hlm 43.

internationally recognized human rights and is guaranteed by many national laws. This is because freedom of speech not only allows individuals to express their views and ideas but also plays a crucial role in supporting government accountability, strengthening the legal system, and fostering democracy.

One of the challenges for legal development in Indonesia is the result of the development of information technology, especially the internet. The rampant evolution of digital technology is transforming the current state of internet infrastructure and its governance in unprecedented ways. However, beneath the technical challenges, these tensions conceal a need to fundamentally reshape internet governance, impacting the distribution of power and the ability to exercise rights and freedoms.⁵ Indonesian law is required to adapt to ongoing social changes.⁶ Therefore, since the enactment of Act Number 1 of 2024 concerning the Second Amendment to the Law on Freedom of Expression, the restrictions are intended to ensure that the exercise of the right to freedom of expression and opinion is in accordance with prevailing societal norms and the law itself, not to prevent individuals or groups from exercising their right to freedom. These restrictions are intended to prevent forms of expression that call for or promote war, discrimination, harassment, and other acts that violate human rights norms. Thus, as long as freedom of expression does not lead to negative things, does not violate ethics and moral norms and is not propaganda for war, discrimination, harassment and rights that violate human rights norms, then freedom of expression must be protected.

In reality, the ITE Act's provisions for protecting the right to freedom of expression have not met public expectations. The only provisions regarding the right to freedom of expression on social media are contained in the Chapter on Prohibited Acts, namely Article 27 (3) and Article 28 of the ITE Act. These articles only outline the obligations that individuals must comply with when using internet technology. Even though President Jokowi has signed the revision of the ITE Act volume II with major changes in the revision, namely deleting Article 27 (3), the fact is that the ITE Act volume II actually replaces it with Article 27A of the ITE Act, which states that: "Any person who intentionally attacks the honor or reputation of another person by making an accusation, with the intention of making it publicly known in the form of Electronic Information and/or Electronic Documents conducted through an Electronic System."

This article also has the potential to become a new, flexible article due to its flexibility and openness to multiple interpretations. Consequently, this article still tends to restrict freedom of expression, as it does not explicitly articulate the rights of users when engaging in communication via the internet. And in its implementation, the ITE Act is still frequently misused. Government officials, in particular, misuse the law to silence those who criticize the state.

Since 2021, there have been at least 36 cases of restrictions on freedom of expression. In 2022, there was a nearly threefold increase, reaching 107 cases, and by 2023, the number had reached 126 cases of criminalization of freedom of expression. The government's approach or efforts, including arbitrary arrests of civilians, criticism resulting in violation of the ITE Act, silencing, forced restrictions, and so on, have undermined efforts to convey criticism and aspirations. owned by the community and has implications for decreasing levels of public trust in the government.⁷

The threefold increase in the number of cases has ultimately led to a decline in the freedom of opinion and expression index in Indonesia. In 2024, at least 30 cases of criminalization of freedom of expression in the digital realm were recorded between January and March 2024. Politics and elections were the most common motives for criminalizing citizens' freedom of expression, with 9 cases. Most internet users reported under the statutory provisions of the ITE Act were athletes, activists, students, content creators, and news sources. The majority of the complainants were representatives of institutions or organizations, public officials, and companies.⁸

The first ITE Act case was that of Prita Mulyasari against Omni Hospital. Prita's story began when she was treated in the emergency unit of Omni International Hospital on August 7, 2008. During her treatment, Prita expressed dissatisfaction with the service provided. She expressed her dissatisfaction in an email, which was then circulated through mailing lists. Prita was accused of defaming the hospital through a mailing list and was subject to criminal and civil penalties. Under Article 27 (3) and Article 45 (1) of the ITE Act, the Tangerang District Attorney demanded that Prita be sentenced to six years in prison and fined 1 billion rupiah.⁹

Next, the case of Fatia Maulidiyanti and Haris Azhar. Both have had to face legal proceedings since the Coordinating Minister for Maritime Affairs and Investment, Luhut Binsar Panjaitan reported them under Article 27 (3) concerning defamation in the ITE Act for reporting on Luhut's alleged share ownership in a mining business in Intan Jaya, Papua. In a video broadcast or podcast on the nge-HAM-tam channel on the YouTube account managed by Haris entitled "there is Lord Luhut behind the economic-military operations relationship in Intan Jaya! General Bin is also there!". In the 28th trial process with the agenda of charges on Monday, November 13, 2023, the Public Prosecutor read out a criminal demand of 4 years in prison for Haris Azhar with a fine of Rp 1.000.000, subsidiary to 6 months imprisonment, while Fatia Maulidiyanti was demanded 3 years and 6 months in prison with a fine of Rp 500.000., subsidiary to 3 months imprisonment.¹⁰

In April 2023, content creator Bima Yudho Saputro was reported to the police after criticizing damaged roads in Lampung. The viral nature of Bima's video led to a report being filed with the Lampung Regional Police on charges of violating the ITE Act. The report related to the use of

⁵ Giovanni De Gregorio dan Roxana Radu, Digital constitutionalism in the new era of Internet governance, *International Journal of Law and Information Technology*, Vol 1, 2022, hlm 68-69.

⁶ Syaifullah Noor, Mohd. Din, Dan M. Gaussyah, Informasi Dan Transaksi Elektronik Dikaitkan Dengan Kebebasan Bereksprei, *Jurnal Ilmu Hukum Pascasarjana Universitas Syiah Kuala*, Vol 3, No 3, 2015, hlm 69.

⁷ Sinta Amelia Febrianasari dan Waluyo, *Op.Cit*, hlm 244.

⁸ Sinta Amelia Febrianasari dan Waluyo, *Op.Cit*, hlm 244.

⁹ Institute for Criminal Justice Reform, PM Vs Negara Republic Indonesia, <https://icjr.or.id/pm-v-negara-republik-indonesia/>, diakses 06 November 2024.

¹⁰ Daeng, Safanet, <https://Safanet.Or.Id/Id/2023/11/Pernyataan-Sikap-Terkait-Kasus-Haris-Fatia/>, diakses 3 Maret 2024.

words deemed hate speech and insults against ethnicity, religion, race, and intergroup relations (SARA). Furthermore, there were allegations of intimidation by related parties against Bima's family.¹¹

The ITE Act specifically targets state officials. The ITE Act is often used by the state to suppress civil society's freedoms and critical voices. In principle, the purpose of enacting the ITE Act is to provide legal certainty, benefit, justice, and guarantee the public's freedom and sense of security in utilizing technology.¹² Although regulations regarding the protection of freedom of expression are stipulated in Article 28E (3) of UUD 1945 and further regulated in the ITE Act, the reality is that the revised ITE Act still contains problematic articles such as defamation and attacks on reputation, hate speech, false information, and access restrictions.¹³

Therefore, this issue is very interesting to analyze in more depth because it concerns the interests of the wider community. Therefore, in-depth debate and analysis of this issue are crucial to ensure that we can adequately address the challenges of the digital age and align with the values and principles underlying the regulations.

2. Research Methods

The research method is a crucial component of any research project, aiming to provide a systematic overview of how the research will be conducted. A research method is a way to solve problem or develop knowledge using scientific methods.¹⁴ This research method aims to produce valid and reliable data, ensuring trustworthy results and making a significant contribution to the understanding of the topic under study. Through appropriate methods, it is hoped that this research will achieve its stated objectives effectively and efficiently.

The type of research employed in this study is empirical-normative juridical, combining normative juridical research, which positions law as a system of norms,¹⁵ with observations of social realities in the field (empirical juridical). The normative approach is used to examine and analyze laws and regulation relating to freedom of expression, particularly in the context of social media and the act (ITE Act). Meanwhile, an empirical approach is utilized to determine the extent to which these legal norms are implemented in practice and their impact on society, particularly social media users who are the targets of law enforcement. Therefore, this research not only examines

applicable legal norms but also explores empirical data through observation or case studies to examine the effectiveness, obstacles, and consequences of implementing these laws in society. Using this empirical normative-juridical method, the research aims to produce a comprehensive, evidence-based analysis, thereby providing more relevant and applicable legal recommendations in accordance with the principle of justice in a state governed by the rule of law.

The research approaches employed in this study include a legislative approach, a conceptual approach, a case approach, and a comparative approach.

This research draws on secondary data obtained through library research on the research materials used, including primary, secondary, and tertiary legal materials.

Data collection were conducted through two channels: literature study (to systematically examine legal norms) and field study (to explore empirical facts from the application of the law). The combination of these two techniques allows researchers not only to understand legal rules from a textual perspective but also to assess the effectiveness, consistency, and fairness of their application in society, resulting in comprehensive findings that can be academically and practically accounted for. The next step is to classify the legal materials and systematically organize the research data.¹⁶

Data analysis is a crucial part of research, as researchers need to process the data obtained and find answers to the problems raised. This step aims to formulate final conclusions from the research. In this study, the method used for data analysis is qualitative, namely by explaining and interpreting data based on principles, norms, and theories or doctrines of legal science, particularly those related to constitutional law.

In presenting the data, the analysis is conducted descriptively and analytically, namely by systematically organizing the data. This approach allows researchers to structure information so that scientific conclusions can be drawn. These conclusions are then used to answer the research questions.

3. Result and Discussion

3.1 Protection of the Right to Freedom of Expression in the ITE Act and the Human Rights Principles in Article 28E (3) of UUD 1945

Everyone has inalienable rights due to their nature as God's creatures, known as human rights. Freedom of expression is one of the many rights a person enjoys protected by human rights. However, the relationship between freedom of expression, as the most fundamental human right protected in international documents such as the UDHR, and increasingly advanced technological developments continues to be contradictory.¹⁷ The emerging issue is that freedom of expression on social media is often perceived as problematic. However, in this era, the role of social media in democracy should not be underestimated. Social media can be a platform for playing a positive role in realizing

¹¹ Kurnia Yunita Rahayu, Kasus Bima Dan Dinamika Kebebasan Berpendapat di Media Sosial, <https://www.kompas.id/baca/polhuk/2023/04/18/kasus-bima-dan-dinamika-kebebasan-berpendapat-di-media-sosial>, diakses 24 Agustus 2024.

¹² Shinta Ressmy Cakra N dan Soni Akhmad Nulhaqim, "Pasal Karet UU ITE dan Pelecehan Konflik Digital di Indonesia", *Indonesian Journal of Social and Political Sciences*, Vol 4, No 2, 2023, hlm 38.

¹³ Nenden, Southeast Asia Freedom of Expression Network, <https://safenet.or.id/id/2024/01/revisi-kedua-uu-ite-masih-mempertahankan-pasal-pasal-karet-yang-lama-menambah-pasal-baru-yang-sangat-berbahaya/>, diakses 24 Agustus 2024.

¹⁴ Joenaidi Effendi dan Jhonny Ibrahim, *Metode Penulisan Hukum Normatif dan Empiris*, Cetakan Ke-2, Prenadamedia Group: Depok, 2018, hlm 3.

¹⁵ Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, Cetakan Ke-7, Pustaka Pelajar: Yogyakarta 2023, hlm 34.

¹⁶ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normative Dalam Justifikasi Teori Hukum*, Jakarta: Kencana, 2016, hlm 181.

¹⁷ Pettersson, Katarina and OV Cristian Norocel. Vernacular Constructions of the Relationship Between Freedom of Speech And (Potential) Hate Speech: The Case of Finland. *European Journal of Social Psychology*, 2024, hlm 702.

democracy. This is because democracy guarantees the people's right to determine the course of state organizations.¹⁸

The existence of social media can provide benefits for public welfare. All levels of society can access social media to express themselves, one way being by expressing opinion in the form of critic of the government.¹⁹ Every individual has the freedom to express their opinion, which is a fundamental human right enshrined in Article 28 E (3) of the UUD 1945.

Article 28E (3) of the UUD 1945 clearly states that: "Everyone has the right to freedom of association, assembly, and expression of opinion." Furthermore, Article 2 of Law Number 9 of 1998 concerning Freedom of Expression in Public also states that: "Every citizen, individually or in groups, is free to express their opinion as a manifestation of democratic rights and responsibilities in the life of society, nation, and state." And Article 23 (2) of Human Rights Act states that: "Everyone is free to have, express, and disseminate opinions according to their conscience, verbally and/or in writing through print and electronic media while taking into account religious values, morality, public order, public interest, and the integrity of the State."

This article provides the constitutional foundation for the recognition and protection of freedom of expression and opinion, which are essential elements of a democratic state governed by the rule of law. This article serves as a crucial constitutional basis for guaranteeing freedom of expression in Indonesia. In practice, this article protects citizens who wish to express their opinions verbally or in writing, including through digital media and peaceful demonstrations. This freedom is a crucial pillar of a democratic state, where people have the space to criticize, provide input, and advocate for common interests.

These articles also align with universal human rights principles, as enshrined in the International Covenant on Civil and Political Rights (ICCPR), which Indonesia ratified through Act No. 12 of 2005.²⁰ The basic principles of human rights state that every human being has inherent and inalienable rights and freedoms. Freedom of opinion and association are fundamental civil rights, as they support personal existence, political participation, and healthy freedom of thought in society.

1. Regarding Freedom of Expression, there are 10 principles:
2. All people must be free to express themselves, seek, receive, and impart ideas, information, and concepts without limits.
3. All people must maintain the internet network, including other communication facilities and infrastructure, especially if it is subject to illegal interference by public or private parties.
4. All people need media and can create diverse and open media, so that everyone can draw conclusions based on

the information received and can actively participate fully in the political world.

5. All people can speak openly and respectfully regarding all forms of differences among people.
6. All people can allow there to be no taboos in the dissemination of knowledge and in the discussion of issues.
7. All individuals must refrain from threats of violence and must not accept intimidation or threats of violence.
8. All individuals must respect others' beliefs or convictions.
9. All individuals have the right to a private life, but they must not refuse surveillance if the public interest requires it.
10. All individuals must be able to resist insults to their reputation without restricting or disrupting legitimate debate.
11. All individuals have the freedom to oppose restrictions on freedom of expression and information imposed for reasons of national security and public order, as well as morality and the protection of intellectual property.²¹

However, in practice, freedom of expression is not an absolute right. As emphasized by Article 19 (2) of the International Covenant on Civil and Political Rights, this is where human rights limitations apply. This means that while everyone has the right to express opinion, disseminate information, and receive information from various sources without interference, this right can still be limited under certain circumstances.

In this case, human rights may be limited by the state, but only by law, for legitimate purposes such as maintaining public order, national security, public morality, or the rights of others. As explained in Article 19 (3) of the International Covenant on Civil and Political Rights, restrictions must be proportionate, non-discriminatory, and not diminish the essence of the right.

It can be said that freedom of expression is part of a number of civil rights that are derogable rights and can be limited by reasonable restrictions and through state legislation.²² Restrictions permitted under international legal instruments must be tested using a method known as the triple test: first, restrictions must be imposed by law. Second, restrictions are permitted only for legitimate purposes as outlined in Article 19 (3) of the ICCPR. And third, such restriction must be genuinely enforced to guarantee and protect the public. This means that the state may restrict freedom of speech if the opinions expressed by an individual or group violate the rights or fundamental values of others.

As a democratic and constitutional state, Indonesia has a significant responsibility to maintain a balance between guaranteeing the rights of its citizens and maintaining social order. Article 28E (3) must continue to be upheld as a constitutional right, but also with the awareness that freedom comes with responsibility. The state, society, and individuals need to maintain dialogue so that guaranteed

¹⁸ Moh Mahfud Md, *Demokrasi Dan Konstitusi Di Indonesia: Studi Tentang Interaksi Politik dan Kehidupan Ketatanegaraan*, Pt Rineka Cipta: Jakarta, 2003, hlm 19.

¹⁹ Nur Rahmawati, *et.al*, *Kebebasan Berpendapat Terhadap Pemerintah Melalui Media Sosial Dalam Perspektif UU ITE, Pranata Hukum*, Vol 3, No 1, 2021, hlm 63.

²⁰ Institute for Criminal Justice Reform, *Mengenal Kovenan Internasional Hal Sipil dan Politik*, <https://icjr.or.id/mengenal-kovenan-internasional-hak-sipil-dan-politik/>, diakses Tanggal 26 Mei 2025.

²¹ Amri Dunan dan Bambang Mudjiyanto, *Pasal Karet Undang-Undang Informasi dan Transaksi Elektronik Bermasalah*, *Majalah Semi Ilmiah Populer Komunikasi Massa*, Vol. 3 No. 1, 2022, hlm 36.

²² Nynda Fatmawati Octarina, *Hukum, Ham, dan Siber Konsep, Peraturan, dan Pelanggaran Dimedia Sosial*, Setara Press: Malang, 2022, hlm 41.

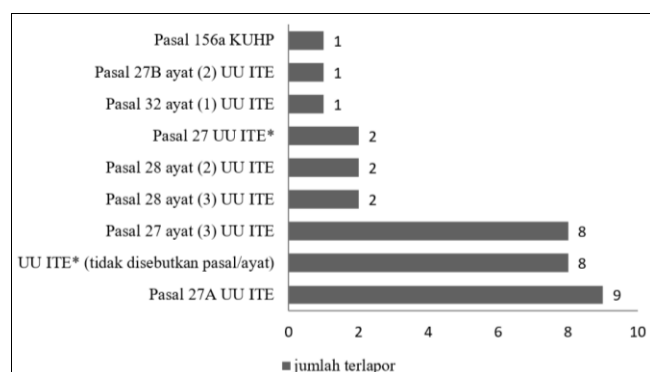
freedoms do not become instruments of chaos, but instead strengthen a healthy and inclusive national life.

Basic human rights principles are the foundation or corridor for defining human rights and contextualizing them within the social, economic, and political life of humanity worldwide. These basic principles are: equality, non-discrimination, inalienability, state obligations, universality, human dignity, indivisibility, and interdependence.²³

The ITE Act demonstrates the state's concern for public unrest that could threaten human rights in the face of issues arising from the technological revolution. Unfortunately, the implementation of the ITE Act often contradicts the spirit of the constitution, often being used as a repressive tool against public criticism of the government or certain powerful parties. Despite being revised twice, the ITE Law remains frequently used to repress citizens exercising their right to express their opinions.

According to Amnesty International, there were 530 cases of violation of freedom of opinion and expression between 2019 and 2024, involving 563 victims under the ITE Act.²⁴ In the first quarter of 2025, there were 34 cases of violations of freedom of expression in the digital realm, an increase of three cases from 31 cases in the previous quarter. Despite the increase in cases, the number of reported cases or victims actually decreased from 52 to 32.

The following is data on the articles most frequently used to restrict freedom of expression in the digital realm from January to March 2025, based on data from SAFENet.



Source: SAFENet, 2025.

The data above shows that Article 27A of the ITE Act is the primary article most frequently used for criminalization, while the ITE Act without a specific article and Article 27 (3) of the ITE Act were each used in eight cases. The majority of reported victims were civilians, while the largest number of complainants were celebrities, with eight. TikTok was the most frequently used platform for reporting, with eleven cases, followed by Instagram with eight cases, and Facebook with six cases. The most recent case involved the arrest of an ITB student for uploading a meme depicting

Joko Widodo and President Prabowo Subianto kissing on social media account X last March.²⁵

The interesting thing from this quarterly report is that there are still many criminalizations against freedom of expression by using Article 27 (3) of the ITE Act which is no longer valid because it was amended by Article 27A of the ITE Act, namely Act No.1 of 2024. The validity of this principle can be applied when the new law has the same position or above the previous position.²⁶ This norm affirms that when a new law is enacted, the old regulation no longer has binding legal force. In other words, the validity of the old norm is declared to have ended and is considered normatively revoked.

Furthermore, the problems caused by the ITE Law indicate an erosion of freedom and human rights in Indonesia. This is a credible international indicator, leading Freedom House to record a sharp decline in civil liberties and political rights. Indonesia's democracy index also declined, from 62 in 2019 to 57 in 2020 and 56 in 2024 and 2025.²⁷

Considering these factors, the impact of the implementation of the ITE Act on freedom of expression in Indonesia is quite significant. Many of the cases above demonstrate that articles in the ITE Act are used to criminalize criticism, which is actually part of human rights, as guaranteed by Article 28E (3) of UUD 1945 and the UDHR. Articles that are still problematic even though they have been revised twice include: Article 27 (3) as amended by Article 27 A concerning defamation and Article 28 (2) concerning hate speech. These two articles are often used to ensnare individuals or groups who voice critical opinions against the government or authorities.

Given this phenomenon, it can be concluded that the implementation of the ITE Act, despite being revised twice, still presents serious problems in its enforcement practices, particularly regarding freedom of expression. The latest revision, Act No.1 of 2024, actually indicates the government's effort to respond to public criticism of articles deemed open to multiple interpretations and repressive. However, the reality on the ground shows that these articles continue to be used to ensnare netizens or activists who express criticism of those in power. The use of articles such as Article 27A concerning defamation and Article 28 (2) concerning hate speech remains flexible and open to wide interpretation. This ultimately creates a chilling effect in society, where citizens are reluctant to voice legitimate opinions or criticisms for fear of legal prosecution.

The principle of *lex posterior derogat legi priori* should provide a strong legal basis for regulating the enforcement of regulations. However, the continued use of old articles that have been formally amended or replaced by new provisions indicates a serious problem in the application of this principle by law enforcement officials. Negligence or carelessness in paying attention to the hierarchical status and validity of legal norms has resulted in the continued practice of criminalization using legal instruments that have lost their relevance and legitimacy. In this context, this not only

²³ Iskandar A. Gani, *Perspektif Yudisial Penyelesaian Kasus Pelanggaran HAM Berat di Indonesia*, Syiah Kuala University Press: Aceh, 2010, hlm 13-14.

²⁴ Amnesty internasional, <https://www.amnesty.id/kabar-terbaru/siaran-pers/27-tahun-reformasi-indonesia-alami-erosi-kebebasan-politik-dan-hak-hak-sosial/05/2025/>, diakses Tanggal 20 Mei 2025.

²⁵ BBC News Indonesia, <https://www.bbc.com/indonesia/articles/czel388wydlo>, diakses Tanggal 20 Mei 2025.

²⁶ Risqi A'maludin...hlm 13.

²⁷ Freedom house, <https://freedomhouse.org/country/indonesia/freedom-world/2025>, diakses Tanggal 20 Mei 2025.

violates the principle of legality but also violates the principle of the rule of law as affirmed in Article 1 (3) of UUD 1945, which states that Indonesia is a state based on law that guarantees legal certainty and justice for all its citizens.

Furthermore, data from Freedom House showing a decline in Indonesia's democracy score from 62 in 2019 to 56 in 2025 cannot be separated from the practice of restricting freedom of expression through legal instruments such as the ITE Act. This decline in the score is an international signal that Indonesia is experiencing a decline in the protection of civil rights, particularly the right to free opinion and expression. Freedom of expression is a key element of a democratic system. When this freedom is restricted, social control over power weakens, opening up space for abuse of authority and covert authoritarianism. In this context, the ITE Act is a contradictory instrument: on the one hand, it is needed to regulate digital activity, but on the other, if not strictly controlled, it could become a tool of repression.

The provisions of Articles 27A and 28 (2) of the ITE Act, despite being updated, remain problematic because they use subjective phrases that are prone to misuse. For example, the terms "attacking honor" or "inciting hatred" in Indonesian legal practice lack adequate objective standards. This leaves interpretation of these articles dependent on the perceptions of law enforcement officials or the complainant, rather than on definitive legal criteria. Furthermore, the lack of a pre-screening mechanism or legal filter before criminal proceedings begin means that subjective reports can be processed directly into the criminal realm. As a result, victims are often individuals exercising their constitutional right to express criticism peacefully in the digital public sphere.

This situation is further exacerbated by the unequal understanding of human rights principles, including the right to freedom of expression, among law enforcement officials. Indonesia, as a state party to the International Covenant on Civil and Political Rights (ICCPR), is obligated to guarantee this right and must not arbitrarily restrict it. In this regard, national laws should be aligned with international standards, rather than becoming a tool of silencing. Therefore, the revision of the ITE Act that has been carried out is not sufficient if it is not followed by strengthening the understanding of human rights, consistent enforcement of the principle of legality, and institutional reform in the investigation and trial of freedom of expression cases.

Considering this complexity, it must be emphasized that the solution to the problem of criminalization of freedom of expression cannot simply be a normative revision of certain articles in the ITE Act. A more comprehensive approach is needed, including strengthening the capacity of law enforcement officials, increasing public legal literacy, and public oversight of ongoing legal processes. The state is obliged to guarantee that every citizen can express their opinion without fear or threat of criminalization, as long as such expression does not violate the rights of others. This is where the consistency in applying the principle of *lex posterior derogat legi priori* is crucial, so that the revised legal product is not merely a formality on paper but has a real impact on a just, democratic legal system that upholds human rights.

3.2 The Concept of Protecting Citizens' Right to Freedom of Expression on Social Media in Accordance with the Principle of Justice

Cireco stated that *ubi societas ibi ius*, where there is society, there is law. This illustrates that in every society there must be law, and the development of that society will influence the development of that law. One factor is the development of science and technology.²⁸ As Sajipto Rahardjo also stated, "In human life, many reasons can be put forward as causes of change in society, but changes in the application of modern technology are currently widely cited as one of the causes of social change."²⁹

Today, with technological advances and the increasing popularity of social media, media has evolved into a means of free and open expression of thoughts, believed to be more relevant and able to reach a wider audience. Through various written and spoken forms on social media, people can more easily express their thoughts, opinions, and ideas. Social media is a large, open medium, and anything posted there can be seen by the wider public.

Providing protection for freedom of expression is one of the hallmarks of a democratic state. Therefore, it is appropriate that the government, in this case the executive branch, and the House of Representatives, which carries the people's mandate, support and strive to uphold this freedom of expression.

The core idea of democracy is that it is the root of the recognition of human rights, securing freedom, justice, and equality for individuals in all areas.³⁰ Democracy promotes the necessary participation and sovereignty of all citizens and state institutions, such as the legislative, judicial, and executive branches. This provides opportunities for the public to actively participate in the national development process, both in the political realm and in various other areas, enabling them to play a direct role in the democratic process. To be considered democratic, a state must be prepared to provide equitable protection for the right to express beliefs.

The principle of justice is a key pillar of the legal system, serving as the foundation for democratic and civilized state governance. Philosophically, justice requires not only equal treatment for all individuals but also universal respect for human dignity and rights. In the context of a state based on the rule of law, the principle of justice requires equal treatment before the law and the application of non-discriminatory rules. This is crucial for the law to function as an instrument for unifying society, rather than a tool for division that creates inequality and public distrust of state institutions.

John Rawls, the highly influential philosopher, through his theory of justice as fairness, put forward two fundamental principles that are still frequently referenced in legal and political studies. When linked to Rawls's notion of justice, the ITE Act can be considered to fall short of these principles of justice. Rawls himself emphasized two key

²⁸ Abdul Manan, *Aspek-Aspek Pengubah Hukum*, Prenada Media: Jakarta, 2005, hlm 159.

²⁹ Samuel Sadik Lakapu, *et.al.* Kebebasan Berpendapat Dalam Media Sosial di Indonesia, *Birokrasi: Jurnal Ilmu Hukum Dan Tata Negara*, No.4, 2024, hlm 135.

³⁰ Christine ST Kansil dan Sulthan Fadhill Hisyam, Negara Hukum Dan Demokrasi Pancasila Terhadap Perlindungan Hak Asasi Manusia (HAM), *MOTEKAR: Jurnal Multidisiplin Teknologi dan Arsitektur*, Vol 2, No 2, 2024, hlm 513.

concepts in his theory: original position and the veil of ignorance. In drafting this law, the government appears to have failed to seriously consider the importance of equal standing for all parties and failed to position itself in a neutral or unknowing position regarding the social status, interests, and backgrounds of individuals, which are essential in creating fair policies. As a result, the resulting policies appear to accommodate the interests of specific groups rather than prioritizing the public interest as a whole. According to Budiman, in practice, the implementation of the ITE Act in Indonesia still faces many serious challenges in realizing this principle of justice.³¹ The ITE Act, enacted in response to developments in information and communication technology, aims to regulate digital interactions, protect electronic transactions, and monitor the distribution of content online. However, the reality on the ground shows a pattern of law enforcement that tends to be discriminatory and inconsistent. Many cases involving violations of the ITE Act display injustice in the handling process.

The general public, especially social media users who voice criticism of the government, public figures, or institutions, are often the targets of excessive criminalization. Accusations ranging from defamation and spreading fake news (hoaxes) to hate speech often carry severe criminal penalties. Meanwhile, individuals with higher social, economic, or political positions rarely face similar sanctions, even when suspected of similar or more serious offenses. This uneven enforcement practice fuels a negative public perception that the ITE Act is being used as a political tool to silence critical voices and maintain the status quo.

Undoubtedly, this inequality in the application of the ITE Law has a chilling effect that is detrimental to democracy. Fear of prosecution makes citizens more cautious or even reluctant to express their opinions in the digital public sphere. Yet, freedom of expression is a fundamental right guaranteed by Article 28E (3) of the 1945 Constitution and is a crucial foundation for openness, participation, and accountability in a democratic system. When this freedom is restricted by unjust laws, the digital public space, which should be an arena for dialogue and constructive criticism, turns into a zone of fear and self-censorship.

Despite reformulations, Article 27A of the Electronic Information and Transactions Law (ITE) remains a source of legal issues that cannot be ignored. This is reflected in Constitutional Court Decision No. 105/PUU-XXII/2024, which stated that the phrases "other people" and "something" in Article 27A contradict the UUD 1945. These phrases are deemed open to multiple interpretations and too broad, potentially leading to the criminalization of legitimate expression protected by the constitution.³²

Article 27A of Act No. 1 of 2024 (ITE Act) does not yet fully balance the protection of reputations and freedom of expression. Although this article has been reformulated to limit the scope for criminalization, several substantial

aspects, such as the clarity of the norm, the high penalty, and the absence of a non-litigation resolution mechanism, remain weaknesses that require further improvement. In the context of a democratic state, the existence of criminal norms should not be a latent threat to citizen expression, but rather a means of targeted and fair protection.

This condition shows the failure of the state in carrying out its function as a state of law (*rechtsstaat*), where law enforcement must be based on the principles of legal certainty, justice, and benefit without discrimination and arbitrary intervention of power. Article 1 (3) of UUD 1945 clearly states that Indonesia is a state of law, so that all state administration actions, including law enforcement, must be carried out fairly and professionally. In the context of the ITE Act, this requires that the law be treated objectively and not influenced by political interests or specific powers.

The application of the principle of substantive justice in the ITE Act also demands that protection of freedom of expression be not only regulated normatively but also implemented in concrete and proportional practices. This means the law must be able to distinguish between constructive criticism and speech that is actually detrimental to others. The law should not be used as a repressive tool to silence criticism, but rather as a means to fairly protect the rights and interests of all parties.

It is also important to understand that the complexity of the digital ecosystem presents unique challenges for law enforcement. The rapid spread of information, limitations on anonymity, and various forms of dynamic interactions make determining the context and intent of a statement more difficult. Therefore, law enforcement officials must have adequate capacity and sensitivity in interpreting and applying the ITE Act to prevent abuse of authority. Professionalism, integrity, and transparency of law enforcement officials are key prerequisites for the implementation of the ITE Act in accordance with the values of justice.

Along with the revision of the ITE Act through Act No.1 of 2024, there are efforts to improve several articles that have been problematic, such as the removal of articles deemed open to multiple interpretations and prone to abuse. This revision represents a progressive step to align regulations with the need to protect human rights and freedom of expression in the digital age. However, regulatory revisions are insufficient if they are not accompanied by a paradigm shift and a more equitable law enforcement system. Without this, the revisions will be merely cosmetic changes that fail to address the root of the problem.

Furthermore, digital and legal literacy education for the public is crucial as a preventative measure, ensuring that information technology users understand their rights and legal limitations when interacting online. A digitally and legally literate public will be better able to protect themselves from the risk of violations and express their opinions responsibly. This will create a healthy, inclusive, and democratic digital ecosystem, while reducing the potential for legal abuse.

The active participation of civil society, academics, and non-governmental organizations in overseeing the implementation of the ITE Act must also be strengthened. Through critical and constructive external oversight, the law enforcement process can become more transparent, accountable, and equitable. The involvement of various stakeholders is in accordance with the principle of

³¹Adhigama A. Budiman, *et.al*, *Mengatur Ulang Kebijakan Tindak Pidana di Ruang Siber Studi Tentang Penerapan UU ITE di Indonesia*, Institute for Criminal Justice Reform (ICJR): Jakarta Selatan, 2021, hlm 28.

³² Dicky Andika Rauf, *et.al*, *Ekuivalensi Kebebasan Berekspresi Dan Perlindungan Nama Baik Pasca Perubahan Undang-Undang Informasi Dan Transaksi Elektronik*, *Al-Zayn: Jurnal Ilmu Sosial & Hukum*, Vol 3, No 2, 2025, hlm 608.

participatory democracy, which places citizens as the main actors in overseeing the implementation of the state.

The social impacts of the unfair implementation of the ITE Act are far-reaching, ranging from diminished public trust in legal institutions, weakened democracy, to the potential for social conflict due to pent-up public dissatisfaction. If this situation is not immediately addressed, it is possible that the quality of digital democracy and the protection of human rights in Indonesia will decline.

The application of the principle of justice in the ITE Act is not merely a normative demand, but a strategic necessity for maintaining the continuity of democracy and the rule of law in Indonesia. The government, law enforcement agencies, and all stakeholders must work together to ensure that the ITE Act functions as a legal umbrella that protects citizens' rights and freedoms proportionally and fairly in the increasingly complex digital era.

In this way, Indonesia can build a democratic, inclusive, and civilized digital ecosystem, where freedom of expression is respected and protected without sacrificing the public interest. This will strengthen public trust in the legal system and uphold the principle of justice as the primary foundation of the rule of law and democracy in the country.

4. Conclusion

Although freedom of expression is recognized as a fundamental human right through Article 28E (3) of UUD 1945 and is based on international human rights principles, the implementation of the ITE Act in practice is still far from the spirit of the constitution. The revisions that have been carried out have not been able to overcome discriminatory and interpretative issues that open up space for arbitrary interpretation, resulting in the criminalization of digital criticism of society. This suppression of freedom of expression is exacerbated by the inconsistency in the application of the principle of *lex posterior derogat legi priori*, the lack of objective standards in law enforcement, and the decline in the democracy index that indicates a decline in the protection of civil rights. Therefore, reform must not only be normative, but must also be accompanied by increasing the capacity of law enforcement officials, public legal literacy, and public oversight mechanisms so that freedom of expression can be implemented fairly and without the threat of repression.

Protection of the right to freedom of expression on social media, in accordance with the principle of substantive justice according to John Rawls, requires the state not only to guarantee freedom formally but also to ensure that this freedom can be enjoyed equally by all citizens, including vulnerable groups. Although Indonesia has revised the ITE Act through Act No. 1 of 2024 concerning Electronic Transactions and Information, practice in the field still shows the criminalization of legitimate expression, especially against individuals who do not have access to power or legal protection. This indicates that justice has not been achieved substantively. Therefore, a more equitable legal approach must be developed through non-discriminatory regulations, proportional law enforcement, and the provision of protection mechanisms that favor citizens as legal subjects. Thus, the protection of the right to expression in the digital space is not only a normative symbol, but also realized in practices that uphold social justice.

5. Recommendations

The government needs to undertake more comprehensive legal reforms to the ITE Act, not only from an editorial or normative perspective, but also in terms of implementation and oversight. This reform includes harmonization of laws and regulations, the establishment of objective and transparent standard operating procedures for handling freedom of expression cases, and the strengthening of independent oversight bodies that can assess whether law enforcement actions violate human rights principles. Furthermore, ongoing education for law enforcement officials and the wider public must be prioritized to reduce arbitrary practices and improve the quality of digital democracy.

To ensure fair and proportional protection of the right to freedom of expression on social media, the principle of substantive justice is necessary in all legal actions related to public expression. The government and law enforcement must be able to distinguish between legitimate criticism as part of freedom of expression and speech that contains elements of a real violation, objectively considering the context, intent, and impact. Furthermore, a fair redress mechanism is needed for victims of digital criminalization and the active involvement of civil society in oversight of legal processes to ensure that the digital public space remains open as a means of healthy participation and social control in a democratic state.

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